

differs from state to state) an easement is not a "State or local legal requirement."

Nor can the Commission require all property owners to grant cable operators access to any easement, as urged in the Comments of Charter Communications Inc. and Comcast Cable Communications, Inc. As discussed in our initial comments, the Commission would have to overrule numerous court decisions interpreting Section 621(a)(2) of the Cable Communications Policy Act of 1984 to reach such a result, and Congress has never granted the Commission authority to expand existing easements in that fashion.

Finally, Congress just completed the most comprehensive revision of federal telecommunications law since the Communications Act of 1934 was enacted. If Congress had desired to provide the telecommunications industry with the right to enter private property to provide services to tenants and residents, it could have done so. Yet the 1996 Act contains no such express statement, nor does it authorize the Commission to mandate access. Consequently, the Commission cannot do so.

C. Service Providers Are Businesses With Sufficient Negotiating Power to Protect Their Own Interests.

As mentioned above, service providers are perfectly capable of striking their own deals with building owners. Service providers are not babes in the woods needing government protection, but large businesses run by capable adults. The Commission cannot guarantee the success or profitability of every technology and every potential service provider, nor should it attempt to do so.

For example, the satellite industry, represented by DIRECTV, wishes to obtain access to wiring installed by the cable industry. Rather than negotiate for the installation of its own wiring or for the right to use existing wiring, DIRECTV hopes the Commission will give DIRECTV a cheaper alternative. Likewise, the cable industry desires to prevent DIRECTV and other wireless and satellite operators from obtaining access to existing wiring to prevent them from gaining access to current cable customers. And both industries claim that building owners are creating a bottleneck merely because they sometimes charge for the right to use their property, so the Commission must force access. This is understandable behavior on the part of the telecommunications industry, but not necessarily behavior that the Commission should reward.

The Commission must consider that building owners deliver a valuable service to service providers by creating desirable environments for people to live and work. In the process, building owners create dense -- and therefore desirable -- service areas for the telecommunications industry. Rather than complain about access fees, service providers should recognize that they are paying for access to a market that the real estate industry has literally built for them.

Landlords do not behave maliciously or capriciously in this respect, but rationally. The need for a particular service must outweigh the various costs of providing it before it will become available in any market. This is particularly the case when an

alternative to the service is already available. Thus, landlords are not gatekeepers or bottlenecks - they have nothing to gain from such behavior. They are simply rational business people making rational business decisions for their individual properties. If the Commission interferes, it will simply distort economic realities.

For example, if the Commission were to adopt MFS's proposal to force building owners that control their inside wiring to allow others access to that wiring at the demarcation point, there would probably be circumstances in which building owners would elect to manage their buildings differently. Thus, they might instead allow a single provider access to all of their risers and conduits, so as to escape the Commission's regulation, in the process actually reducing subscribers' options and forcing competitors out. (As noted above, we do not believe the Commission could do anything about such a decision, because forcing physical access to risers would be beyond its statutory authority and prohibited by the Fifth Amendment.)

If service providers need access, they can agree on terms of access with the property owner; property owners have no incentive to ban or restrict service providers from providing good service to tenants. NJBPU would force access on the grounds that cable operators must have the right of access so they can conduct maintenance and repairs. This example actually illustrates our point very well. Building operators have no incentive to ban entry by qualified personnel performing work required for service

providers to meet their obligations to tenants. In fact, a landlord has every interest in ensuring that maintenance and other work is done promptly and efficiently. Consequently, they will grant such access, subject to the right to control access for security and safety reasons, as discussed in our initial comments. The marketplace works perfectly well for this purpose, and Commission regulation cannot possibly do better.

USWest alleges that the number of building owners taking responsibility for their own wiring is increasing, which is supposedly leading to more exclusive contracts and less choice for subscribers. We note that USWest has introduced no evidence of their claim. We find it hard to believe that there were actually more buildings served by multiple providers at any time in the past than there are today. As noted in the comments of Ameritech cited above, the best thing the Commission can do is foster competition within the telecommunications industry -- as more choices become available, building owners will make those choices available to their tenants and residents, because tenants and residents will demand them.

II. THE COMMISSION SHOULD NOT ATTEMPT TO TREAT ALL TYPES OF PROPERTY THE SAME WAY.

As we noted in our initial comments, the distinctions between various types of commercial and residential properties require that they be treated differently. Thus, it may be necessary to establish different demarcation points for different types of properties. See Comments of DIRECTV at 10. Indeed, the current telephone inside wiring rules recognize that

configurations vary from building to building and these variations must be accommodated. See Comments of NJBPU.

It may also be necessary to make other distinctions between commercial and residential procedures, and between different types of property within those categories. The Commission should not limit itself to concerns about differences in technology or the type of service involved.

III. THE COMMISSION'S AUTHORITY TO ESTABLISH A DEMARCATION POINT DERIVES FROM THE COMMISSION'S AUTHORITY TO DEFINE THE RATE BASE AND REGULATE CARRIER SERVICE OFFERINGS; IT DOES NOT INCLUDE THE RIGHT TO TRANSFER PROPERTY RIGHTS.

The Commission should not deceive itself into thinking that its power to prescribe demarcation points carries with it the power to dictate ownership in property. The Commission has the authority to prescribe a uniform system of accounts for carriers and to regulate the classes of property for which depreciation may be claimed. 47 U.S.C. § 220. The Commission may also regulate the services offered by carriers. 47 U.S.C. § 201. The Commission's authority to establish the demarcation point flows from these two statutory provisions, neither of which gives the Commission the right to preempt or transfer property rights. Consequently, the Commission may not use the power to establish the demarcation point as a justification for preempting a building owner's ownership rights under state law.

A. The Demarcation Point is a Tool for Accounting for a Service Provider's Costs, not a Means of Transferring Property Rights from Building Owners to Service Providers.

An analysis of the history of telephone inside wiring shows that the FCC first developed federal policy with respect to a demarcation point as part of the deregulation of telephone wiring, in order to facilitate accounting for such wiring. But the Commission also recognized that a precise identification of a single point of demarcation to distinguish that portion of the investment which will continue to be capitalized and that portion which will be expensed cannot be made for each and every circumstance." Uniform System of Accounts: First Report and Order, Docket 79-105, 85 F.C.C.2d 818, 826 (1981).

Subsequently, the Commission began using the concept of the demarcation point to define the point at which the telephone company's facilities terminated and the customer's began. Review of 68.104 and 68.213 Report and Order and Further Notice of Proposed Rulemaking, 5 FCC Rcd 4686, 67 R.R.2d 1280 (1990) ("The demarcation point has served for both establishing the permissible points of connection by customers of wiring and CPE and for accounting purposes."); Amendment of Part 68: Second Notice of Proposed Rulemaking and Order, Docket 81-216, 92 FCC 2d 1, 8 (1982).

The mere fact that the demarcation point specifies the place at which responsibility for the communications service may change does not mean that physical access to the wiring up to that point can be required, or is permitted, by administrative fiat. The

For example, under state fixture laws (either common law or statutory), a fixture is defined as personalty that upon being affixed to realty takes on the character of and becomes a part of that realty. However, as with most aspects of fixtures law, the definition varies between jurisdictions. Custom, conflict of laws, statutory provisions and the like, all work to define fixtures laws differently in various jurisdictions. Thus, whether wire or cable is deemed a fixture or merely personal property in a jurisdiction will often determine the ownership of the cable.

Whether an item is deemed a fixture is largely dependent on examining the facts and circumstances, which in most jurisdictions includes an analysis of such factors as the intention of the parties, particularly the person who annexes or attaches the personalty to the realty; sufficiency of the annexation; the use to which the annexed article is being put and how well it is adapted to the general use or purpose of the realty; and annexation by or consent to annexation by the personalty owner.

Most jurisdictions hold that articles attached to premises by the tenant in a permanent manner are fixtures which cannot be later removed by the tenant. Even if the Commission were to adopt a rule giving the tenant ownership at the time of installation, in such jurisdictions the ownership of the wire would pass to the landlord by operation of law. Thus, in some jurisdictions, wiring that has been installed by a cable operator

in a property owner's building becomes a fixture that is deemed owned by the property owner. In other jurisdictions, if the wiring can be removed without injury (however that term may be defined in that jurisdiction) to the land owner, the cable operator presumably retains ownership of the wire. Finally, as noted by NJBPU, state tax laws may also have a bearing on whether a chattel becomes a fixture or not.²

Given the range of factors and rules which are used to determine if wiring is a fixture, it is clear that a state-by-state, property-by-property application of fixture law would be required to determine the effects of any uniform Commission rules tying physical access to the demarcation point. Such an approach by the Commission would not be lawful, administratively practicable, or operationally desirable.

B. The Commission May Set the Demarcation Point Where It Pleases, so Long as it Does Not Interfere With the Landlord's Right to Control its Property.

For accounting purposes, the Commission may set the demarcation point wherever it is empowered to do so -- the crucial consideration to building operators is preserving their rights to manage and control access to their properties.

² Several commenters have urged a greater role for federal regulation of inside wiring and at least one has called for exclusive federal control of all inside wiring. See Comments of DIRECTV at 13. Although we do not believe that transferring ownership of wiring is necessary to address the issues the Commission has raised, we recognize that preempting all state and local regulations to impose a uniform system of federal regulation might have that effect. Instead, the Commission should follow the suggestion of Motorola, Inc., to minimize regulation. Comments of Motorola at 6.

Treatment of wiring for regulatory purposes can be handled in a number of ways, but regulatory accounting does not require that the service provider have physical control of the wiring or forced access to the premises on which it is emplaced. For example, DIRECTV has proposed the use of a "virtual demarcation point," which is not a physical location but a concept that would allow two or more service providers to share bandwidth on a single wire. Comments of DIRECTV at 8-9. We do not cite this proposal for the purpose for which DIRECTV introduces it, but to make the point that if two or more entities are sharing a wire, that wire can still be included in the rate base for each provider, even though they share ownership and neither necessarily has access to it.

Thus, the Commission can address regulatory concerns without necessarily affecting the rights of building operators to control and manage their property.

C. The Demarcation Point Should Be at a Place Determined by the Property Owner by Agreement with the Service Provider.

We wish to clarify and reemphasize a point we made in our initial comments. Building operators are not unanimously in favor of placing the demarcation point in one particular place. Some believe it should be at the property line, others that it should be at a single point in the basement of the building, others that it should be in a phone vault on each floor of a building, and others that it should be directly outside a tenant's premises. Particular buildings have distinctive

configurations and uses, and individual owners have different interests and concerns regarding the management and control of wiring. All the same, the owners are unanimous in stressing the need to retain that degree of control over their property as they choose to exercise. Some building owners are prepared to assume the responsibility of owning and maintaining inside wiring, but others are not. For convenience, the demarcation point should be presumed to be at the property line, but it would not be appropriate or practical to impose a single uniform demarcation point.³ Many building owners may choose to allow service providers access to their risers and conduits, and in such cases may wish to agree on different demarcation points for operational purposes.

If a building owner chooses to exclude providers and retain ownership and control over the wiring, it has that right. But if a building owner chooses not to own the wiring and to permit service providers access to the building, it has that right, also. That decision is not governed by an accounting convention, nor does the owner's decision necessarily control the carrier's accounting.

As noted by BellSouth, "Historically, telephone companies and private property owners have negotiated for rights to use

³ Most commenters argue in favor of customers having access to wiring inside their premises. We concur with this view, although there are some respects -- such as in the case of an apartment resident -- in which customer access and ownership of wiring is of limited value to the customer. In any event, under no circumstances should a tenant or resident have any ownership or access rights in wiring outside of the demised premises.

private property with reference to state customs and practices and without interference from the FCC. . . . Cable operators and MDU owners should have the corresponding freedom to allocate their rights and responsibilities through negotiations."

Comments of Bell South at 5.

USWest calls for a plan under which existing buildings would be grandfathered, and for new construction the Commission would provide building owners with a range of options for demarcation based on technology and the owner's needs. Comments of USWest at 7. We oppose this proposal because it imposes too great a restriction on building owners' property rights, but at least it recognizes the need for flexibility and the likelihood that the owner's needs will vary.

In any event, the location of the demarcation point should not be allowed to interfere with a building owner's right to control its property, for the reasons set forth in our initial comments.

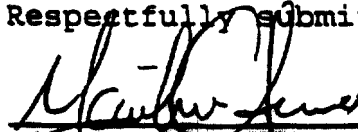
Conclusion

The Commission should recognize that it lacks jurisdiction to order the owners of multi-unit buildings to allow telecommunications providers to emplace their facilities on private property and that, in any event, there are sound and persuasive reasons why the Commission should not attempt to regulate access to multi-tenant buildings.

Accordingly, the Commission should (i) decouple the access-to-property and the demarcation-point issues in its NPRM, (ii)

abandon any attempt to deal with access to private property, and
(iii) adopt rules for the specific demarcation point and other
wiring issues raised by the NPRM that reflect the realities of
the diverse physical and market characteristics of multi-tenant
buildings.

Respectfully submitted,



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ATTACHMENT

Apartment Living

Giving Amenities a New Ring: Latest Offering at Charles E. Smith Properties Is Complete Telephone Service

BY LAURA OCHIPINTI ZANER

Pools, fitness centers, clubhouses, and fireplaces—these are just some of the amenities that apartment residents have come to expect in upscale communities throughout the Washington metropolitan area. Now they can expect something new: voice mail. That's because there is now a national telephone network, called GE Capital ResCom, that provides telephone and other communication services exclusively for apartment residents.

The network recently announced that it has teamed up with Charles E. Smith Residential Realty to market complete packages of high quality phone services at significant savings at Smith owned or managed apartment communities throughout the metropolitan area.

The company has already begun to convert 16 properties located in Maryland and Virginia to the new service, and will eventually install the service in all their new properties. Residents of the Westery at Worldgate, an upscale community managed by the Smith Company, have enjoyed the telephone service since the community opened last year.

Access to the telephone network allows residents of these properties to avoid the extra step of contacting the phone company to have their phones turned on—residents are simply given their new telephone number at the time they sign their apartment leases. The package provides a range of additional features such as call waiting, call forwarding, free unlisted numbers, and voice mail. There's also what's called "number portability," a

feature that allows customers to keep their old phone numbers if they so desire.

In addition, residents can sign up for one of three different plans—the Silver, Gold or Platinum, and receive as much as a 20 percent discount on all long distance calls. Because the management

company receives what's called "bulk rates" from the service provider, it is able to pass on the savings to its residents.

In addition to the Westery, other Smith-owned apartment communities that are expected to offer the service in the near future include The Lansburg, located on 8th St., NW, and the Ellipse, which is located at the Fairfax Government Center.

The venture with GE Capital Rescom represents the Smith Company's latest effort to remain on the cutting edge when it comes to services and amenities.

"We're a leader in providing a wide range of amenities to our residents," says Lee La Rochelle, Smith's vice president of marketing for residential management, who notes that many of the company's communi-

ties already offer concierge, valet and maid services, as well as 24-hour front desk staff, courtesy patrols and on-site fitness centers and other recreational facilities.

Enhanced telephone service, however, may just be the beginning for today's apartment residents. GE Capital Rescom is one of several firms across the nation that are pioneering the "smart apartment." According to GE Capital Rescom, such apartments will come with both the high-tech engineering capability and the high-tech products that will enable residents to enjoy such state-of-the-art services as teleconferencing, videoconferencing, and interactive television. ■



A national telephone network called GE Capital ResCom teamed up with Charles E. Smith Residential Realty to provide the residents of the Westery at Worldgate with high quality telephone services.